Supreme Court, U.S.
FILED
DEC 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-1107

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO. _____

DANIEL H. HENDERSON,
Petitioner

- vs -

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE APPELLATE COURT OF THE
STATE OF CONNECTICUT

JOHN R. WILLIAMS
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Counsel for Petitioner

20pp

QUESTION PRESENTED

1. Did the Connecticut Appellate Court effectively deny Petitioner his Sixth and Fourteenth Amendments right to effective assistance of trial counsel by unreasonably denying him a speedy and effective remedy which could have been fully resolved before imposition of sentence?

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

The petitioner, DANIEL H. HENDERSON, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Appellate Court of the State of Connecticut entered in this proceeding on July 29, 1986.

OPINION BELOW

The opinion of the Appellate Court of the State of Connecticut is reported at 8 Conn. App. 342, 512 A.2d 974 (1986), and appears in the Appendix hereto.

JURISDICTION

The opinion of the Appellate Court of the State of Connecticut was entered on July 29, 1986. A timely petition for review of the Appellate court decision by the Supreme Court of the State of Connecticut was denied on October 29, 1986. This petition for certiorari has been filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

1. Did the Connecticut Appellate Court effectively deny Petitioner his Sixth and Fourteenth Amendments right to effective assistance of trial counsel by unreasonably denying him a speedy and effective remedy which could have been fully resolved before imposition of sentence?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment VI:

In all criminal prosecutions, the accused shall the enjoy the right...to have the assistance of counsel for his defense.

U.S. Constitution, Amendment XIV:

...No state shall...deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULES INVOLVED

Connecticut Practice Book, Section 903:

Unless otherwise permitted by the judicial authority in the interests of justice, a motion for a new trial shall be made within five days after a verdict or finding of guilty or within any further time the judicial authority allows during the five-day period.

Connecticut Practice Book, Section 935:

The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner.

STATEMENT OF CASE

Daniel H. Henderson, having been charged in the Connecticut Superior Court with several crimes, entered pleas of guilty in consolidated proceedings. He was sentenced to terms which included a period of imprisonment and was immediately incarcerated.

Eighteen days later, having obtained a new attorney, he moved pursuant to Section 903 of the Connecticut Practice Book for a new trial and pursuant to Section 935 of the Connecticut Practice Book to correct an illegal sentence. Both motions were supported by his own lengthy affidavit and the supporting affidavits of several other witnesses, asserting in great detail that his previous attorneys had engaged in a course of deception which caused him to

enter his guilty pleas in the belief that he would receive a sentence of probation without incarceration or a jail sentence far shorter than those actually imposed. He expressly alleged, as did his witnesses, that his earlier attorneys had assured him that they had a close personal relationship with the judge and that they promised sentence would in fact be imposed were he to plead guilty and to stand by that plea. In fact, there was no agreement with the sentencing judge, no promises had been made or assurances given, and Mr. Henderson received only that sentence considered appropriate by the Court. Had he known the true state of facts, he asserted that he would not have pled guilty.

Mr. Henderson acted expeditiously in obtaining new counsel and explaining his

circumstances to the trial Court, but owing to his incarceration he was unable to do so until several days after sentencing. Within the time provided for taking an appeal, however, he changed his attorney and filed the motions noted previously. The trial Court heard oral argument on those motions, but refused to take evidence and denied the motions without opinion or any statement of reasons. Presumably the trial Court agreed with the prosecution argument that the issues presented should be raised only by habeas corpus petition in another court and not by a motion for new trial or motion to correct.

A timely appeal was filed in the Connecticut Appellate Court, and that Court affirmed holding that "both motions, no

matter how they are couched, raise the claim of ineffective assistance of counsel. We will not review the defendant's claim of ineffective assistance of counsel. We heed our Supreme Court's admonition that habeas corpus proceedings rather than direct appeals are best suited to test the performance of counsel, including those claims arguably supported by the record as well as those requiring an evidentiary hearing." The Connecticut Supreme Court declined to review the matter, and this petition was filed.

REASONS FOR GRANTING THE WRIT

THE CONNECTICUT APPELLATE COURT EFFECTIVELY DENIED PETITIONER HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BY UNREASONABLY DENYING HIM A SPEEDY AND EFFECTIVE REMEDY WHICH COULD HAVE BEEN FULLY RESOLVED BEFORE IMPOSITION OF SENTENCE.

Although a full evidentiary hearing undoubtedly would be required, it appears very likely that if the Petitioner substantiates the claims contained in the affidavits reproduced at Appendix C, his conviction will be ordered set aside. See generally, McMann v. Richardson, 397 U.S. 759 (1970); Tollett v. Henderson, 411 U.S. 258 (1973); United States v. Agurs, 427 U.S. 97 (1976); United States v. DeCoster, 624 F.2d 196 (D.C.Cir. 1976). The Connecticut courts, however, by unreasonably burdening Petitioner with irrational

procedural requirements, would effectively deny him any meaningful opportunity to be heard on his claim by requiring in effect that he begin serving his sentence before pursuing the matter. Since the sentence involved in this case -- incarceration for a period of six months, to be followed by probation -- in all likelihood would have been entirely served before Mr. Henderson could have obtained a ruling on a state habeas corpus petition.

Mr. Henderson, however, presented his claim to the trial Court before imposition of sentence. The trial Court could have resolved the matter speedily, as it was of all courts the most familiar with the factual basis for the claim.

This Court has made it clear that assuring constitutionally effective

assistance of counsel in criminal cases is the responsibility primarily of the trial Court. E.g., Holloway v. Arkansas, 435 U.S. 475 (1978); Cuyler v. Sullivan, 446 U.S. 335 (1980). See also, Glasser v. United States, 315 U.S. 60 (1942). The effect of the Connecticut Appellate Court opinion in this case is in exactly the opposite direction. Connecticut's policy now is one of encouraging trial judges to avoid resolution of these issues and to pass the cases to other judges in other courts months or years after the events have taken place. This policy, although ostensibly predicated upon state procedural rules, profoundly implicates federal constitutional rights and the policy of this Court. In long run, the surest guarantee that Sixth Amendment rights will be

protected and respected lies in encouraging trial judges to take personal responsibility for the enforcement of those rights at the time of trial. In the present case, Connecticut has adopted a policy of discouraging trial judges from shouldering that responsibility.

Accordingly, a writ of certiorari should issue in this case to assure that Connecticut will not maintain its present course of discouraging the vigorous enforcement of the Sixth Amendment in its courts.

CONCLUSION

For these reasons, to encourage trial-level enforcement of the Sixth and Fourteenth Amendments, a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of the State of Connecticut.

Respectfully submitted:

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Attorney for Petitioner

86-1107

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- vs -

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Respondent.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO

THE APPELLATE COURT OF THE

STATE OF CONNECTICUT

JOHN R. WILLIAMS
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Counsel for Petitioner

APPENDIX

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STATE OF CONNECTICUT

V.

DANIEL H. HENDERSON

NOS. 4205, 4206 and 4207.

Appellate Court of Connecticut.

Argued June 13, 1986.

Decided July 29, 1986.

John R. Williams, New Haven, for appellant (defendant).

Bernadette Conway, Sp. Asst. State's Atty., for appellee (State).

Before SPALLONE, DALE and BIELUCH, JJ.

SPALLONE, Judge.

The defendant pleaded guilty to four criminal charges contained in three separate informations. A judgment of conviction was rendered in each case, and the defendant has filed a separate appeal from each judgment. Because the issues in

each appeal are identical, we have ordered, suo motu, that the appeals be combined. Accordingly, this opinion is applicable to all three appeals.

On March 29, 1985, the defendant was sentenced by the trial court following his pleas of guilty to reckless endangerment in the second degree in violation of General Statutes §53a064, larceny in the third degree in violation of General Statutes §53a-124, forgery in the third degree in violation of General Statutes §53a-140, and forgery in the second degree in violation of General Statutes §53a-139. He was sentenced to a total effective term of three years, suspended after eighteen months, with three years probation thereafter.

On April 17, 1985, new counsel for the defendant filed motions for a new trial and to correct an illegal sentence in each case. These were denied by the court after it disallowed the defendant's request for an evidentiary hearing on the motions. On appeal, the defendant claims error in the court's denial of his motions.

At the outset, two factors are immediately apparent. First, the motion for a new trial was untimely, having been filed far after the five days specified in Practice Book §903.[1] Second, both motions,

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1 Practice Book §903 provides: "Unless otherwise permitted by the judicial authority in the interests of justice, a motion for a new trial shall be made within five days after a verdict or finding of guilty or within any further time the judicial authority allows during the five-day period."

no matter how they are couched, raise the claim of ineffective assistance of counsel.

[1] We will not review the defendant's claim of ineffective assistance of counsel. We heed our Supreme Court's admonition that habeas corpus proceedings rather than direct appeals are best suited to test the performance of counsel, including those claims arguably supported by the record as well as those requiring an evidentiary hearing. State v. Leecan, 198 Conn. 517, 541, 504 A.2d 480 (1986); State v. Colon, 8 Conn. App. 11, 112-13, 510 A.2d 1023 (1986); State v. Aspinall, 6 Conn. App. 546, 554-55, 506 A.2d 1063 (1986).

The defendant argues that the trial court's failure to provide the defendant with an evidentiary hearing constitutes an

abuse of the trial court's discretion and that had the court conducted such a hearing, it would have satisfied the Leecan pronouncement that "all claims of ineffective assistance ... be evaluated by the same trier in the same proceeding." We disagree.

[2] Initially, we note that a trial court's procedure in acting on motions is not a substitute for a habeas corpus proceeding. All matters concerned with the alleged illegal confinement of the petitioner in habeas corpus, including the conduct of the trial judge, are subjects of a habeas hearing.

In that the granting of a motion for a new trial is wholly discretionary; State v. Asherman, 193 Conn. 695, 735, 478 A.2d 227 (1984) cert. denied, _____ U.S. _____, 105

S.Ct. 1749, 84 L.Ed.2d 814 (1985); the trial court's ruling on a motion for a new trial should stand unless it is shown that the court abused its discretion. Kubeck v. Foremost Foods Co., 190 Conn. 667, 669-70, 461 A.2d 1380 (1983). The defendant has failed to demonstrate such abuse.

[3] The trial court's action in denying the defendant's motions to correct an illegal sentence and its failure to afford the defendant an evidentiary hearing with regard to such motions also reflect the exercise of the court's discretionary power. The judge who ruled on the motions in this case also sentenced the defendant after she conducted a canvass supports the defendant's later allegations, by affidavit, that he was subject to certain misrepresentations by counsel which induced

him to enter his guilty pleas. The trial court was confronted with the fact that the position taken by the defendant during his canvass was contrary to that expressed in the allegations contained in his affidavit. The court performed its function of resolving the conflicting stances assumed by the defendant and in the exercise of its discretion, based on the facts and circumstances of the case as presented at the hearing on the motions, denied such motions.

There is not error.

In this opinion the other Judges concurred.

APPENDIX B

SUPREME COURT

STATE OF CONNECTICUT

STATE OF CONNECTICUT v. DANIEL H. HENDERSON

The defendant's petition for certification for appeal from the Appellate Court, 8 Conn. App. 342, is denied.

John R. Williams, in support of the petition.

Michael E. O'Hare, assistant state's attorney, in opposition.

Decided October 29, 1986

APPENDIX C

NO. CR13

STATE OF CONNECTICUT :SUPERIOR COURT

VS. :G.A. 13 -- AT WINDSOR

DANIEL H. HENDERSON :APRIL 16, 1985

MOTION FOR NEW TRIAL

Pursuant to Section 903 of the Practice Book, the defendant respectfully moves that he be granted a new trial, in the captioned case for the reason that his pleas of guilty herein were the result of misrepresentations and misunderstandings between himself and defense counsel and were not the product of a knowing, voluntary or intelligent waiver of any of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The relief requested by this motion is mandated by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and by the Due Process Clause of Article I, of the Connecticut Constitution.

In the interests of justice, this Court should permit this motion to be filed and considered by the Court at this time, although more than five (5) days have elapsed since judgment entered. Less than twenty (20) days have elapsed since that date, and the information is question could not be prepared by the defendant and submitted to the Court until he was able to obtain new and independent counsel. Since the defendant was incarcerated under this Court's order, it was impossible for him to do so within five (5) days of judgment.

In support of this motion, the defendant submits herewith his affidavit and the affidavits of Gennie Henderson, Irene Gormley, David Henderson and Donald Henderson.

THE DEFENDANT

BY_____

JOHN R. WILLIAMS
51 Elm Street
New Haven, CT 06510
His Attorney

NO. CR13-

STATE OF CONNECTICUT :SUPERIOR COURT

VS. :G.A. 13 -- AT WINDSOR

DANIEL H. HENDERSON :APRIL 16, 1985

MOTION TO CORRECT ILLEGAL SENTENCE

Pursuant to Section 935 of the Practice Book and the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article I, of the Connecticut Constitution, the defendant respectfully moves to vacate his sentence in this case for the reason that it was illegally imposed since it was the result of a plea of guilty obtained solely as a result of misunderstandings and a failure of communication between himself and his attorney, so that his plea of guilty in fact was not a knowing, voluntary or intelligent waiver of any of his rights under the Fourth, Fifth,

Sixth and Fourteenth Amendments to the United States Constitution and Article I, of the Connecticut Constitution.

In support of this motion, the defendant submits herewith his affidavit and the affidavits of Gennie Henderson, Irene Gormley, David Henderson and Donald Henderson.

THE DEFENDANT

BY_____
JOHN R. WILLIAMS
51 Elm Street
New Haven, CT 06510
His Attorney

NO. CR13-

STATE OF CONNECTICUT :SUPERIOR COURT

VS. :G.A. 13 -- AT WINDSOR

DANIEL H. HENDERSON :APRIL 16, 1985

SUBMISSION OF EVIDENCE IN SUPPORT OF MOTION FOR NEW TRIAL AND MOTION TO VACATE SENTENCE

In support of his motion for a new trial and of his motion to vacate sentence, the defendant respectfully submits to the Court the attached affidavits.

THE DEFENDANT

BY_____

JOHN R. WILLIAMS
51 Elm Street
New Haven, CT 06510
His Attorney

STATE OF CONNECTICUT)
)
COUNTY OF NEW HAVEN) ss:
)

DANIEL HENDERSON, being duly sworn, hereby deposes and says:

1. I am over eighteen years of age.

2. I believe in the obligation of an oath.

3. This affidavit is based upon my personal knowledge.

4. I am presently an inmate at the Connecticut Youth Institution 42 Jarvis St., Cheshire, Connecticut.

5. On or about January 14, 1985, I accompanied my wife, my mother, and my brother to the office of Charles Thompson, Attorney at Law.

6. I told Attorney Thompson my situation, but he continually interrupted me and continually referred to the charges in a

familiar manner; such as "Larceny Deuce, and Larceny Five." He told me he was familiar with my case.

7. I had been referred to Attorney Thompson from Attorney Donovan.

8. I had originally approached Attorney Donovan to take my case, but he said he couldn't because of a conflict of interest.

9. On the initial visit, Attorney Donovan requested $2500.00 to take my case.

10. Attorney Thompson never discussed the details of my case on the initial visit.

11. Attorney Thompson told me that he could get me off with no problem. I tried to get some more details, but he wouldn't give me any. He said he would take Judge Susco out to dinner and talk with her about the sentence. He said, "she'll do me a favor." He often referred to Judge Susco

as "Wendy" and told me that she was known as "let 'em go Susco."

12. On or about January 11, 1985, I appeared in Manchester Superior Court with Attorney Daryl Ross, who is Attorney Thompson's Associate. Attorney Thompson had pointed Mr. Ross out to me previously, and said he would meet me at court if Attorney Thompson could not make it. At no time did Attorney Ross interview me prior to the court date on January 11.

13. On or about January 11, 1985, we (my family and I), met with Attorney Ross at about 11:00 a.m. We met him inside the courtroom. He told me, "I don't have your file. I don't know anything about your case." He went into the prosecutors office and stayed inside for about ten or fifteen minutes. He then came out and said, "they

got a lot on you. The prosecutor has taken a personal interest in your case, and he is out to get you." I asked him, "what kind of time do you think I can get out of it?" He avoided the question. He said that "they," meaning the prosecutors, would never, "jerk me around." I understood that to mean that they would never lie to Attorney Ross. I pointed out that I was innocent of the charges. He said that they have more than enough evidence to convict you. He said the prosecutors told him they had photographs of me cashing the checks. He said, "you ought to take any deal you can get." My mother got angry and yelled at him. She tried making alternative suggestions, such as offering to make restitution, or pleading guilty to just a few charges. But Attorney Ross didn't want

to discuss it anymore. Attorney Ross said the prosecutors didn't want jail time for me, they wanted prison time. I asked him what he meant, and he said that jail time was like going to Hartford, and that prison time is like going to Somers. I asked him what kind of time they wanted, and he read off a list of my charges on a yellow legal lined pad and the number of years was listed next to each charge. They added up to twenty years. We then went to court and got a continuance until January 25, 1985. I don't recall seeing either Attorney Thompson or Attorney Ross anytime in between those court dates.

14. On January 25, 1985, I went to court with my wife Lori. My mother was unable to attend because of a death in our family and she was involved with the necessary

arrangements. We met with Attorney Ross. Attorney Thompson was not present. Attorney Ross went into the prosecutors office and stayed for about five or ten minutes. He came out and said, "we're in luck. The other prosecutor, who took a personal interest in the case was not going to be in due to his wife having a miscarriage. You lucked out. This other prosecutor is going to drop a couple of charges from "C" felonies, down to "D" felonies, if you plead guilty today. You are never going to get a deal like this again." I asked him about going to trial. He said, "they have more than enough evidence to convict you, and you'll definitely get twenty years. Take this deal now and you'll get between three and ten months." He said that Wendy Susco was his professor in college and that she

had done favors for him before; for "Charlie" and him. He said we would get a real good deal. I asked him about probation and he told me that maybe there was always a possibility. He told me that I didn't have anything to worry about. He told me to take my wife out to dinner and have a good time and relax and not to worry about the time coming up. I asked him what he thought about the deal. He told us about other people who hadn't taken deals and had gotten fifteen to twenty years. Then he told me that he had to go back in and tell the prosecutor that I was taking the deal, that the guy was giving me a break and that I would never see this kind of deal again. He told me to plead guilty with no recommendation as to sentence. It was better, so that he could get it before

Judge Susco, that he could get a real good deal from her. He told me that she was real easy on sentences, and he referred to her the same way that Attorney Thompson did as, "let 'em go Susco." I did not give Attorney Ross a definite answer as to pleading guilty. He said, "I am going to go in and tell them that you are taking the deal." I was thinking about the twenty year sentence and made no attempt to stop him. He only stayed in the prosecutor's office for a second. He walked in and out. He told me that when I went up before the judge not to plead not guilty on any of the charges. When the judge asked me if I was on drugs and alcohol to say no. He said they were going to ask me if any promises or threats had been made to me. I was to say no. The judge would not accept the

plea otherwise and that I would never see this kind of deal again. The other prosecutor wanted to give me a lot of time. I said, "twenty years is a lot of time." He nodded his head.

15. He went into the courtroom and eventually appeared before the judge. The judge asked me several questions. He did it for each charge that I had pled guilty to. Among the questions the judge asked me, was if anyone had promised me anything or threatened me into pleading guilty? If I was doing it of my own free will and for no other reason? I answered, "yes Your Honor." I know I lied to the judge, but his was what my attorney told me to do. He said they wouldn't accept the plea if I didn't say these things. For each charge he asked me the same questions. He asked

them five or six time. He then said, "I can accept this plea," or something like that. I was then given about four to six weeks for a pre-sentence investigation. It became about two months because Judge Susco had to go on vacation.

16. My mother and I met with Attorney Thompson and Attorney Ross several times during that two month period. On the first meeting after I pled guilty, my mother insisted that the plea be taken back. My mother had spoken previously on the phone with Attorney Ross who said that if we wanted to, the pleas could be withdrawn, but that it would not be good for their reputation. After my mother told him to withdraw the plea, he accused us of not telling him all the charges that were against me, at the initial meeting. We had

tried to, but he acted like he knew all about it. My mother continually asked for a meeting with the attorneys after the court date, and after several postponements, one finally occurred. We would set dates for meetings, and they would agree and then not show up.

17. At this meeting, my mother, brother and I were present. My mother said that she wanted to go to trial. Attorney Thompson said that I would get twenty years. He said that he was going to take Wendy, Judge Susco, out to dinner. They had been out to dinner many times before. He was going to talk to her about the case.

He said that more than likely, I'll get you probation. My mother argued with him that she wanted the pleas withdrawn because she didn't want them on my record.

Attorney Thompson said, "screw his record if he gets probation." I urged my mother to take the deal, because I wanted to get it over with. He told us that he would see her, Judge Susco, in a couple of days, and would call us to tell us what happened, but he never did.

18. We gave Attorney Thompson a call after a few days. We had another meeting with both attorneys about a week or two later. Attorney Thompson said he couldn't talk to the judge because the other prosecutor was back and that he had told the judge not to talk to anyone from Thompson's office about the case, because he had a personal interest in it. My mother again asked him to get the pleas withdrawn. Attorney Thompson said that it could not be done because the judge had asked me the

questions about the promises and the threats. Those answers were on paper now and nothing could be done. I tried to make him be definite about time. He said he would see Judge Susco again. He said that he would try to get me probation to three months. He couldn't promise anything, but she always does favors for them. That is why they call her, "let 'em go Susco." We tried to make him be definite about when he was going to go see Judge Susco. He said he would go see her in three weeks and that he would get a hold of us, but he never did. He gave us a specific date when he was going to see her on, but I don't remember what it was.

19. We had another meeting in about a month to five weeks later. Both attorneys were there. Attorney Thompson said that

Judge Susco had not read the whole pre-sentence investigation report, and that he was going to see her the next day. My mother still wanted to withdraw the pleas. She told him that if he didn't want to go to trial for us, that he should tell us now and that we would get another lawyer. I suggested that Attorney Thompson should go see Judge Susco the next day, and see if he could get the deal for probation. Attorney Thompson agreed, and said that if we could not get the deal that we will withdraw the pleas and go to trial. My mother repeated what he was saying just to make sure, and he confirmed it. He said that he would get a hold of us as soon as he found out, but he never did.

20. I called the office on several more occasions, and finally spoke with Attorney

Ross. He said that he would go up and see Judge Susco. This continued until the day of sentence.

21. One week exactly before the day I was sentenced, Attorney Thompson said he was going into the judge's chambers so I was to be there late. He did not show up until about 12:00 p.m. He said the judge was giving him no indication as to sentence. My mother argued with him, and asked if we could get the pleas withdrawn. He told us absolutely not. My mother asked if we could fire him right in front of the judge. He said it might work, but that he didn't want to do that because it would tarnish his reputation.

22. I have good reason to believe that Attorney Thompson told the prosecutor that I had not shown up on that day, because

when Judge Susco wouldn't give me any time to get my affairs in order she said it was because I had not appeared in court the week before. Anyway, on this day, the case was continued until the following Friday.

23. After the postponement, I gave the attorneys a call, and it took a couple of days to get through to them. It was on Thursday, the day before my court day, when I finally got to speak to Attorney Thompson. He said that he was going to talk to Judge Susco, and I was to be in Court.

24. On Friday morning I asked if he had talked to the judge. He went into the prosecutors' office a couple of times. I never did see him go into the judge's office that day, but he said he had. He said that I would never get more than six months, and more likely three, because

Whitley, the companion case to mine, got six months. My record was better, I was younger, and had a family that I was supporting.

25. We went into the courtroom. My entire family was present. I pled to something, I don't know what it was. Then something was being nolled. The judge asked the attorneys what was being nolled, and it turned out to be the Larceny 2. I asked Attorney Thompson if I was allowed to talk on my own behalf. He said he would ask, but he didn't bother. I did not get the opportunity to talk on my own behalf at all.

_____

DANIEL HENDERSON

Subscribed and sworn to before me this 13th day of April, 1985.

NOTARY PUBLIC

I am GENNIE HENDERSON of Meriden, Connecticut. I am employed at the Aetna Life & Casualty Insurance Company as a Computer Programmer.

In Dec. 1984 my son Daniel was granted a continuance to hire a new Attorney.

On or about Jan. 14th Danny, his wife, myself and his brother David went to see Atty Charles Thompson. We discussed at length Danny's case. I told Atty Thompson that I always accompanied Danny to be sure he did not accept any deal without being

fully informed as to the possible outcome. After discussing all of the circumstances surrounding the case, the outcome of our talks was that Atty Thompson was going to 1) File Motions; 2) Look into getting Danny Probation 3) If not probation, GO TO TRIAL. We made it very clear that if Dan could not get probation, we wanted to go to trial. Atty Thompson assured us that was the path he would take and we engaged him to represent Danny.

On Jan. 25th, approx. 1-week or so after our first meeting with Atty Thompson, Danny went to Manchester Court with Atty Ross, an associate of Atty Thompson's. Because of the seriousness of the charges, as I stated above, I always accompanied my son on his court appearances to be sure he was fully and properly informed. I always

questioned the Attorney so I could interprete to Danny exactly what possibilities exist if he accepted any offer the State made.

The week of Jan. 25th my mother passed away and in my grief, I forgot Danny's court date. Danny did not want to burden me with any problems at that time and he went to Court without me. When he returned, he said Atty Ross "made a deal". When I questioned Dan, he said he was not sure what the deal was but said the Attorney said it was a good deal and if I did not take it, he could never get that deal again so he did what the lawyer told him. I was very concerned and immediately went to Atty Thompson's office.

When I questioned him about the deal they (Atty Thompson & Ross) were very vague

and said they did not have all the papers yet, etc. When I finally found out some of the counts he pleaded to, I was shocked, and when Danny realized there was nothing prearranged before he pleaded we were upset. Danny requested that his plea be pulled back immediately.

Danny requested that his plea be pulled back immediately. Atty Thompson said that could not be done. I told Atty Thompson that JUDGE MACK appeared to be a decent, reasonable man and I truly believed that if he knew the circumstances, that Danny was misadvised and trusted the Attorney, that JUDGE MACK would give Danny the opportunity to go to trial. I made it very clear to Atty Thompson that if he did not do the right thing, we would go before the Judge and make that request.

Atty Thompson said he was very good friends with Judge Wendy Susco and he would meet with her in a few days; he promised that if he did not get a commitment from her for probation or something acceptable, he would pull back Dan's plea. Every week he made the same promise right up until sentencing week (March 22nd).

On March 22nd we met Atty Thompson at Windsor Court for the sentencing. He was supposed to have seen the Judge the night before to give us an answer, and at that point he still did not have any offer. We told him if he did not know or have any idea what Dan was facing as far as sentencing, Danny would have to tell the Judge the story, that he was misadvised, misrepresented, etc. and ask the Judge if he could pull back his plea and have the opportunity

to go to trial. At that point Atty Thompson went to the Judge's chambers and when he returned, he said he asked the Judge for a 1 week continuance because he had an appointment in a short while. It was continued to March 29th. Atty Thompson promised us he would see Judge Susco on Weds. (3/27) and said if he did not get something concrete from her, he would have Dan pull back his plea.

On March 29th we met Atty Thompson at Windsor Court. He met with the prosecutor - he met with the Judge, etc. before we went into the courtroom. He said Danny would not get more than 6 months. We questioned him several times on the sentence and he assured us Dan would not get more than 6 months. He told us if Danny made restitution (which he did

mention during the week) even though he did not get anything, he would use it as a "bargaining chip" for probation. I asked him what would happen if they did not accept that - we did not want Danny to pay back money he never received if he was still going to get 6 months. Atty Thompson said if he did not get probation, his sentence would be cut in half to 3 months. Danny's Uncle was present and offered to loan Danny the money. We had no reason to believe that Atty Thompson did not make any agreements as he was back and forth in the prosecutor's office before we went into the courtroom.

When Judge Susco Sentenced Danny, we were all shocked and realized that Atty Thompson never made any deal before court and lead Danny to believe he knew what

Danny's sentence would be so Danny would not try to pull back his plea and tell the court that he was misrepresented.

By not being truthful, Attorney Thompson denied Danny the right to a trial.

GENNIE HENDERSON

A-F-F-I-D-A-V-I-T

I, IRENE GORMLEY of Meriden, Ct. attended Daniel Henderson at Windsor Court on March 29, 1985.

I was with Daniel, along with other members of the family, when his attorney Charles Thompson, told Daniel that he would not get more than 6 months for his sentence. I also heard him tell Daniel that an offer of restitution could possibly get him probation or cut his 6 month sentence in half. Different members of the family questioned the Attorney regarding his sentence.

IRENE GORMLEY

Subscribed and sworn to this 6th day of April, 1985 at Meriden, Ct.

_____

NOTARY PUBLIC

AFFIDAVIT

I am David Henderson, Meriden, Ct. I was with Daniel Henderson when he hired Attorney Thompson and knew of the agreemen when he retained him; which was to file motions - go for probation - or go to trial.

I was also present on several occasions when Daniel told his Attorney to pull back his plea because he was made to believe that he had a good deal and he would get much worse if he did not take it He assumed there was some arrangement for probation or something acceptable because we discussed that when Daniel retained him

Attorney Thompson promised him that i he did not get something acceptable from the Judge he would pull back Dan's plea. He promised Daniel an answer every week up

until sentencing.

On March 29, 1985 I heard Attorney Thompson tell Daniel that he would not get more than 6 months. He said if he made restitution he would use that as a "bargaining chip" for probation and at worse get his sentence reduced to 3 months. Daniel believed him and so did the rest of the family.

Daniel did not ask to have his plea pulled back even when the Judge questioned him because according to what his Attorney said, he would not get more than 3 or 6 months at worst.

Attorney Thompson deceived Daniel into believing that so Daniel would not tell the Judge Attorney Thompson grossly misrepre-

sented him.

DAVID J. HENDERSON

Subscribed and sworn to this day of April, 1985.

NOTARY PUBLIC

AFFIDAVIT

I am DONALD HENDERSON of Meriden, Connecticut. I am a Computer Programmer with a Consulting Firm. On March 29, 1985 I was at Superior Court in Windsor with Daniel Henderson regarding the disposition of his case.

I was aware that Attorney Charles Thompson promised Danny he would know in advance what his sentence would be so he could have the option of pulling back his plea so he could go to trial.

On more than one occasion that morning, in my presence, I heard Atty Thompson tell Danny that he would not get more than a 6 month sentence. He also told Danny that if he offered restitution, even though he didn't get anything, he could use it as a bargaining chip to show good faith and ask

for probation in return. He assured Danny that if he did not get probation, he would probably get his sentence reduced to half the time, 3 months. Several of us questioned the Attorney on that. My Uncle offered to loan Danny the money (approx. 2,200). We all questioned the Attorney to be sure Danny knew what his sentence would be before he appeared before the Judge.

When Danny was sentenced by Judge Susco, it was a total surprise to all of us. we realized that Atty Thompson had no intention of pulling back the plea and he lead Danny to believe he knew what his sentence would be before-hand so Danny would not stand before the Court and claim he was mislead and misrepresented by Atty

Thompson.

DONALD T. HENDERSON

Subscribed and sworn to before me this 30th day of March, 1985 at Meriden, Connecticut.

NOTARY PUBLIC

Supreme Court, U.S.
FILED
FEB 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1107

(3)

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

DANIEL H. HENDERSON,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE STATE OF CONNECTICUT

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QUESTION PRESENTED

WHETHER THE TRIAL COURT DENIED THE PETITIONER HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY REFUSING TO CONDUCT AN EVIDENTIARY HEARING REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL RAISED FOR THE FIRST TIME IN BELATED POST JUDGMENT MOTIONS.

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CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Rule 17.1, Revised Rules of the Supreme Court of the United States

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or had decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by lower court, as to call for

an exercise of this Court's power of supervision.

(b) When a state court of last resort had decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals had decided an important question of federal law which has not been, but should be, settled by this Court, or had decided a federal question in a way in conflict with applicable decisions of this court.

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Connecticut Practice Book § 903

Unless otherwise permitted by the judicial authority in the interests of justice, a motion for a new trial shall be made within five days after a verdict or finding of guilty or within any further time the judicial authority allows during the five-day period.

Connecticut Practice Book § 935

The judicial authority may at anytime correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in any illegal manner or any other disposition made in an illegal manner.

OPINION BELOW

The opinion of the Connecticut Appellate Court is reported at 8 Conn. App. 342, 512 A.2d 974 (1986), and is found in the petitioner's appendix at pages 1a - 7a.

JURISDICTION

The judgment of the Connecticut Appellate Court was entered on July 29, 1986. The Connecticut Supreme Court, by order dated October 29, 1986, denied a petition for certification to appeal from the Appellate Court decision. The petition for a writ of certiorari was filed on December 26, 1986. The jurisdiction of this Court is invoked under 28 United States Code § 1257(3).

STATEMENT

The petitioner was charged with a number of offenses in three separate informations. On January 25, 1985 the petitioner entered pleas of guilty to larcency in the second degree, forgery in the second degree, forgery in the third degree, larcency in the fifth degree and reckless endangerment in the second degree. Before accepting the petitioner's plea, the trial court, Mack, J., canvassed the defendant extensively concerning the voluntariness of his pleas. During the plea canvass, the petitioner expressly stated that no promises had been made to him in order to induce him to enter his pleas. The court then continued the case for a presentence investigation.

On March 29, 1985, the defendant

appeared before the trial court, Susco, J., for sentencing. Prior to imposing sentence, the court allowed the petitioner to withdraw his plea of guilty to larceny in the second degree and enter a plea of guilty to larceny in the thrid degree instead. Before accepting the petitioner's plea, the court again canvassed the petitioner concerning the voluntariness of his plea. The petitioner again expressly stated that no promises had been made to him to induce him to plead guilty. After accepting the petitioner's plea, the trial court sentenced him to an effective term of imprisonment for three years, execution suspended after eighteen months and three years probation thereafter.

On April 16, 1985, new counsel for the petitioner filed a motion for a new

trial purusant to Connecticut Practice Book § 903 and a motion to correct an illegal sentence pursuant to Connecticut Practice Book § 935. In his motions, the defendant claimed that his pleas of guilty were the result of misrepresentations made to him by his previous defense counsel. Petitioner's Appendix at 1c-4c. On May 15, 1985, the trial court, Susco, J., denied the defendant's motions.

The petitioner appealed to the Connecticut Appellate Court, assigning as error the denial of his motion for a new trial and motion to correct an illegal sentence. On appeal, the defendant claimed the trial court abused its discretion as a matter of Connecticut law in denying his motions. On July 29, 1986, the Appellate Court affirmed the petitioner's conviction. The petitioner

then filed a petition for certification in the Connecticut Supreme Court, claiming that the Appellate Court's decision was in conflict with the Connecticut Supreme Court's holding in State v. Leecan, 198 Conn. 517, 504 A.2d 480, cert. denied, 106 S. Ct. 2922 (1986). On October 29, 1986, the Connecticut Supreme Court denied the petitioner's petition for certification.

ARGUMENT

The instant petition for certiorari presents a remarkably frivoulous issue for this Court's consideration. The defendant contends that the trial court violated his right to effective assistance of counsel when it refused to conduct an evidentiary hearing concerning his claim of ineffective assistance of counsel which he raised for the first time eighteen days after the imposition of sentence. The petitioner argues that the preference of Connecticut courts for resolving such claims through habeas corpus proceedings rather than by post judgment motion or direct appeal "unreasonably burdens [him] with an irrational procedural requirement." Petition for certiorari at 10. The petitioner's tenuous claim does not warrant review by

this Court for serveral reasons.

First, the petitioner raised his constitutional claim for the first time in his petition for certiorari. In the trial court, the defendant did claim that his first defense counsel was ineffective. On appeal, however, the petitioner made no claim that the trial court's denial of his motions violated his rights under the Sixth Amendment of the United States Constitution. In the Connecticut Appellate Court, the petitioner claimed only that the trial court abused its discretion under the Connecticut Rules of Court. See Respondent's Appendix at A1-A8. After his conviction was affirmed, the petitioner sought review of the Appellate Court's decision in the Connecticut Supreme Court. In doing so. the petitioner again failed to raise a

federal constitutional claim. In his petition for certification to the Connecticut Supreme Court, the petitioner claimed only that the decision of the Appellate Court was in conflict with the Connecticut Supreme Court's ruling in State v. Leecan, supra. *1 See Respondent Appendix at A9, A10 - A15.

In Cardinale v. Louisiana, 394 U.S. 437, 89 S. Ct. 1162, 22 L.Ed.2d 398 (1969), this Court held that it would not "decide federal constitutional issues raised here for the first time on review of state court decisions." Id., 438. Moreover, Rule 17.1 of the Revised Rules of the Supreme Court of the United States

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1 In State v. Leecan, supra, 541, the Connecticut Supreme Court ruled that claims of ineffective assistance of counsel are more properly resolved in a habeas corpus proceedings than on direct appeal.

indicates that certiorari will be granted only when the issue has been ruled upon in a lower court. Here, the petitioner has clearly failed to raise his federal constitutional claim in the state courts below. Accordingly, this Court should decline to review his claim. See Michigan v. Long, 463 U.S. 1032, 1053, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983); Fay v. Noia, 372 U.S. 391, 399, 83 S. Ct. 822, 9 L.Ed. 837 (1963).

Second, the petitioner has failed to establish any prejudice from the procedure employed by the Connecticut courts in resolving his claim of ineffective assistance of counsel. The petitioner claims that he was prejudiced by the trial court's ruling because his claim cannot be resolved in a collateral proceding until after he has served his

entire sentence.*2 The petitioner, however, has neglected to inform this Court that he was released on bond pending the outcome of his appeal. While free on bond, the petitioner filed a petition for a writ of habeas corpus in the Connecticut Superior Court raising the same claim which underlies this petition for certiorari. On December 2 and 3, 1986, twenty three days before he filed his petition to this Court, the defendant was afforded a full evidentiary hearing on his claim. Although the petitioner's request for bond was denied by the court hearing his habeas corpus petition, the State has made no effort to incarcerate him pending the outcome of

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2 The petitioner incorrectly states that he was sentenced to incarceration for six months. In fact, he was sentenced to incarceration for eighteen months. State v. Henderson, supra, 343.

his habeas corpus petition. *3 Thus, contrary to the petitioner's assertion, he will obtain a ruling on his claim prior to serving his entire sentence.

Finally, there is no merit to the petitioner's claim that the Connecticut procedure for resolving claims of ineffective assistance of counsel violated his Sixth Amendment rights. The petitioner first raised his claim of ineffective assistance of counsel eighteen days after the imposition of sentence and thirteen days after the expiration of time permitted for filing a motion for a new trial. The petitioner apparently contends that his belated invocation of the Sixth Amendment

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3 The court's decision on the petitioner's state habeas corpus petition is still pending at this time.

entitled him to reopening of his case. This Court, however, has frequently recognized the state's interest in the finality of judgment in criminal prosecutions. See e.g., Engle v. Issac, 456 U.S. 107, 127, 102 S. Ct. 1558, 71 L.Ed. 783 rehearing denied, 456 U.S. 1001 (1982); Wainwright v. Sykes, 433 U.S. 72, 90, 97 S. Ct. 2497, 53 L.Ed. 594 (1977). Accordingly, the trial court reasonably concluded that the petitioner's Sixth Amendment claim was more appropriately resolved through a petition for a writ of habeas corpus.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THE RESPONDENT
STATE OF CONNECTICUT

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By: Julia DiCocco Dewey

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No. 86-1107

In The
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OCTOBER TERM, 1986

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APPENDIX

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EXCERPTS FROM PETITIONER'S BRIEF
TO THE CONNECTICUT APPELLATE COURT

I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO CORRECT ILLEGAL SENTENCE AND HIS MOTION FOR NEW TRIAL

A. The Guilty Pleas Were Obtained In Violation Of Mr. Henderson's Rights Under The Sixth And Fourteenth Amendments To The United States Constitution And Article I, Section 8, Of The Constitution Of Connecticut

. . . .

The court having chosen to hear no evidence on Mr. Henderson's motions, the allegations in the accompanying affidavits must be deemed to be true for present purposes. Those allegations unquestionably demonstrate gross violations of the Sixth and Fourteenth Amendments to the United States Constitution and of Article I, Section 8, of the Connecticut Constitution, rendering the pleas involuntary and invalid.

A guilty plea entered as a result of an affirmative misrepresentation by defense counsel of the sentence which will be imposed as a result must be set aside. E.g., McAleney v. United States, 539 F.2d 282 (1st Cir. 1976); O'Tuel v. Osborne, 706 F.2d 498 (4th Cir. 1983); United States v. Russell, 686 F.2d 35 (D.C. Cir. 1982); Hornak v. Warden, 40 Conn. Sup. 238 (1985). See also United States v. Rumery, 698 F.2d 764 (5th Cir. 1983); United States ex rel. Ferris v. Finkbeiner, 551 F.2d 185 (7th Cir. 1977). The fact that the defendant, acting in response to his lawyer's misrepresentations, himself denied at the guilty plea proceeding that any such promises had been made to him -- all of which he explained to the court in his post-plea affidavit -- does not preclude him from

raising the issue after plea or the court from considering and acting upon it. United States v. Blackner, 721 F.2d 703, 709 (10th Cir. 1983).

The evidence before the court on the motions was clear and undisputed that the gross misrepresentations had taken place and that without those misrepresentations no guilty plea would have entered. Accordingly, the defendant met the test of Hill v. Lockhart, ___ U.S. ___, 54 U.S.L.W. 4006 (1985), and his pleas should have been -- and should now be-- set aside.

B. Mr. Henderson's Motions To Correct And For New Trial Were Proper Vehicles For Presenting This Issue To The COurt, And Accordingly Should Have Been Granted

Mr. Henderson raised at the earliest possible time, given his circumstances, the matters now before this court on

appeal. The facts were squarely presented to the court within twenty days of judgment -- indeed, in the case of No. A.C. 4206, in which plea and sentencing were on the same day, within twenty days of the date of the guilty plea. The relevant facts are precisely the same as those in State v. Anonymous (1980-9), 36 Conn. Sup. 578, 421 A.2d 557 (App. Sess. 1980), in which eighteen days after plea and sentencing a defendant moved to vacate judgment and withdraw his plea. In that case, to be sure, the state did not challenge the procedural device utilized to being the matter before the court. Were it invalid, however, the court would have been without jurisdiction to order the relief it did. The fact that the court did vacate the plea is at least some evidence that the

procedural device utilized was a proper one.

Mr. Henderson filed alternative motions in an effort to assure that the trial court would have before it an appropriate tool to dispense what justice in this case clearly required. One of his motions was a motion for a new trial. Although that motion was filed more than five days after judgment, Section 903 of the Practice Book permitted the court "in the interests of justice" to entertain the motion at a later time. Since the time for taking a direct appeal had not yet run when the motion was presented, the court clearly had power to hear the motion for a new trial. Since the relief requested was unquestionably required if the supporting affidavits were credited, and the new trial motion allowed the

sentencing judge herself to consider the matter and rule rather than forcing the case upon a habeas corpus judge unfamiliar with the case, and the reason for Mr. Henderson's inability to file within five days of judgment was obvious and compelling, the interests of justice clearly required that the motion be heard and decided on its merits. The failure to do so, and especially the failure to articulate any reason for not doing so, must be held an abuse of discretion.

Mr. Henderson's Motion to Correct was filed pursuant to Practice Book § 935, which provides: "The judicial authority may <u>at anytime</u> correct . . . any other disposition made in an illegal manner." (Emphasis supplied.) The motion and its supporting affidavits demonstrated that an illegal disposition

had been made in these cases. The trial court clearly had jurisdiction to hear and decide the motion on its merits.

Both motions unquestionably were timely. Being timely, they were procedurally correct mechanisms with which to raise the issue tendered. According to the allegations of the uncontradicted affidavits, a gross violation of law and miscarriage of justice had been committed. Under either motion, the court was empowered to set aside the manifestly illegal judgments in the cases and set them down for trial.

The only circumstances under which the court could properly have denied the motions before it would have been an explicit finding by the court that the allegations contained in the affidavits were untrue. Yet no hearing was held and

no opposing evidence of any sort was considered by the court. Consequently, the allegations of the affidavits must be presumed true. The court was obliged, therefore, to address those allegations and grant the relief requested.

CONCLUSION

This case must be remanded to the Superior Court with directions either to grant either the motion for new trial or the motion to correct, by setting aside the judgments in the cases and granting Mr. Henderson the trials he seeks, or in the alternative to grant Mr. Henderson and the state an evidentiary hearing on those motions.

ISSUE PRESENTED BY PETITIONER FOR CERTIFICATION TO THE CONNECTICUT SUPREME COURT

ISSUES PRESENTED

I. Under State v.State v. Leecan, 198 Conn. 517 (1986), must a claim of ineffective assistance of trial counsel be raised only by a Petition for Writ of Habeas Corpus when the issue is fully presented to the trial court less than twenty (20) days after entry of judgment?

EXCERPTS FROM PETITIONER'S PETITION FOR CERTIFICATION TO THE CONNECTICUT SUPREME COURT

I. UNDER STATE V. LEECAN, 198 CONN. 517 (1986), A CLAIM OF INEFFECTIVE ASSISTANT OF TRIAL COUNSEL NEED NOT BE RAISED ONLY BY A PETITION FOR WRIT OF HABEAS CORPUS WHEN THE ISSUE IS FULLY PRESENTED TO THE TRIAL COURT LESS THAN TWENTY DAYS AFTER ENTRY OF JUDGMENT

Without question, if the Petitioner is able to prove to the satisfaction of the Court the allegations contained in the papers he filed below, he will have made out a sufficient claim of ineffective assistance of counsel entitling him as a matter of constitutional law to set aside the judgment entered against him. United States Constitution, Amendments 6, 14; Connecticut Constitution, Article I, Section 8; McAleney v. United States, 539 F.2d 282 (1st Cir. 1976); O'Tuel v. Osborne, 706 F.2d 498 (4th Cir. 1983);

United States v. Russell, 686 F.2d 35 (D.C. Cir. 1982); Hornak v. Warden, 40 Conn. Sup. 238 (1985).

A prior decision by the predecessor to the current Appellate Court permitted a defendant to move to vacate judgment and withdraw his plea eighteen (18) days after judgment had entered. State v. Anonymous (1980-9), 36 Conn. Sup. 578, 421 A.2d 557 (App. Sess. 1980). In that case, to be sure, the State did not contest the procedural device used. undoubtedly, however, the State chose not to contest that device for precisely the reasons that the Court here should permit it to be used -- judicial economy and fundamental fairness.

The reasoning which underlies State v. Leecan requires that defendants under circumstances like those presented by

this case not be required to utilize habeas corpus as the mechanism for raising claims of ineffective assistance of counsel. The very point of State v. Leecan is that Appellate Courts are not finders of fact and cannot do justice to the necessarily conflicting claims involved in assertions of ineffective assistance of counsel since they lack the benefit of a full elaboration of the facts at an evidentiary hearing. When the issue in question is adequately tendered, as here, to the very trial court which witnessed the performance of the attorney and is presented to that court before the time for taking an appeal has expired, that court clearly has the authority under Sections 903 and 935 of the Practice Book to conduct the very evidentiary hearing which an

Appellate Court needs. Moreover, the trial court is better suited than a habeas corpus court to conduct such a hearing, since the trial court has had the benefit of actually witnessing the performance of the attorney whose conduct is under challenge.

Moreover, the savings in judicial resources by following the procedure sought by Petitioner here would indeed be substantial. A new judge would not be required to become familiar with the record of the case. The matter would be heard almost immediately upon the close of the proceedings under attack so that neither side would suffer the prejudice which inevitably follows during long periods of delay, such as failed recollection, lost witnesses or missing records. Thus, the public interest in

expediting and reducing the time and inconvenience involved in judicial proceedings would be served, as would the interest of the State in being afforded the very best possible opportunity to meet the challenge. Defendants raising the claim of ineffective assistance of counsel, of course, clearly would benefit by being given an opportunity to be heard before having served all or most of any sentence of incarceration imposed. All of these considerations argue in favor of using such procedure in this particular case. More important for present purposes, however, they are reasonable and sensible procedures which ought to be followed in all cases.

This case gives this Court the opportunity to make it clear that state v. Leecan does not prohibit utilization

of this sensible and economical procedure in cases of this kind. Accordingly, certification should be granted.

CONCLUSION

For the reasons stated above, certification should be granted as requested.